No. 93-217

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

TAYLOR INVESTMENT, LTD., COLLEEN DUFFY PRICE and JAMES P. DUFFY,

Petitioners,

vs.

UPPER DARBY TOWNSHIP, DONALD C. PHILLIPS, JAMES C. WARD, RUDOLPH D'ALESIO, MARIO L. CIVERA and NANCY WHITE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the courts below depart from established precedent when they determined that the petitioners' claims of constitutional rights violations, whether premised on substantive due process, procedural due process, or equal protection violations, were not ripe for judicial review because the petitioners had not sought, nor given the local land planning authority the opportunity to render, a final decision on the nature and extent of the impact of the zoning ordinances on the petitioner's property.

A. The decisions of the courts below did not depart from the precedent established by this Honorable Court in *Williamson*. This Honorable Court's decision in *Patsy v. Florida Board of Regents*, as explained by the Court in *Williamson* is simply distinguishable and thus inapplicable to this case.

B. The lower courts did not depart from established precedent in holding that the petitioners' equal protection claims (racial animus) were not ripe for judicial review.

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A. The Decisions of Courts Below Did Not Depart From the Precedent Established By This Honorable Court in *Williamson*. This Honorable Court's Decision in *Patsy Florida Board of Regents*, as Explained By the Court in *Williamson* is Simply Distinguishable and Inapplicable to This Case. 13

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COUNTERSTATEMENT OF THE CASE

At the outset it is important to note that, ripeness is a jurisdictional question which must be decided before reaching the merits of a case. Accordingly, a fairly brief recitation of the facts is all that is needed.[1]

The instant case arises out of the petitioners' attempt to develop a third parcel of real estate in Upper Darby Township. At all times relevant to this instant case the Taylor Investment petitioners were very experienced in real estate investment and development. (App. at 47-48, 53-54 and 134-35). Petitioner Price is an experienced real estate attorney (App. at 47-48 and 53), and all petitioners are partners in several real estate partnerships which hold title to approximately twenty properties in the greater Philadelphia area. (App. at 53-54 and 134 -35).

Prior to the time of the allegations of the petitioners' Complaint in the instant case, the petitioners, through the aforesaid partnerships, owned and/or leased two properties within Upper Darby Township, located at 67 Long Lane (the "Long Lane" property) and at 7042 through 7062 Terminal Square (the "Terminal Square" property). (App. at 148-49). During the course of the petitioners' acquisition and development of the Long Lane and Terminal Square properties and while contemplating the acquisition and construction of the property which is the subject of

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1. The petitioners have presented a relatively lengthy rendition of the "merits" of their claim in the Statement of the Case section of their Petition. In this regard, the petitioners' Statement of the Case is impermissively argumentative and is sprinkled with legal conclusions. A fuller recitation of respondents' version of the facts may be found in respondents' Motion for Summary Judgment and subsequent Reply Brief filed below. (*See* Docket Nos. 30-31, 37) The inclusion of facts in respondents' Counterstatement of the Case herein should not raise the inference that all of these facts are "material" for the purposes of this Honorable Court's review.

this lawsuit, the petitioners initiated contact with Upper Darby Township political leaders in attempts to solicit these officials' favor and political influence to obtain approval for the projects or uses they wished for these properties. (App. at 67, 146-47 and 150-61).

In January of 1990, the petitioners entered into an agreement to purchase the property at 3 South State Road in Upper Darby Township ("the premises") from the mortgage holder in foreclosure. (App. at 143). The premises were located in a district zoned C-1 under the Upper Darby Township zoning ordinance.[2] Prior to the petitioners' purchase of the premises, this property had last been used as a health and fitness club. (App. at 140-41). The health club had a swimming pool and sauna and was used for physical fitness. (App. at 290). The health club use was authorized by special exception granted by the Zoning Hearing Board of Upper Darby Township on September 30, 1982. The health club then became a non-conforming use when the zoning ordinance was amended in 1986. (App. at 60). The petitioners admit that they obtained and reviewed a copy of the Upper Darby Township Zoning Ordinance of 1986 and were aware of the applicable zoning classifications and permitted uses. (App. at 61-62).

In February of 1990, the petitioners solicited the assistance of respondent, Upper Darby Township Councilman Civera to help expedite the process of obtaining a necessary demolition permit for the premises. (App. at 162). Thereafter, on or about July 18, 1990, the petitioners were introduced to co-petitioner Gregory Patlakh. Mr. Patlakh was interested in opening a pool hall and came to the

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2. C-1 is labeled a neighborhood commercial district defined as providing "appropriate locations for convenience type commercial and service uses primarily to meet the needs of individuals living in the immediate neighborhood." Article 5, Section 501 of the Upper Darby Zoning Ordinance of 1986 further outlines the permitted uses in this zone. (App. at 23-25).

petitioners in search of a suitable location with approximately 5,000 square feet of floor space. (App. at 91, 271-72 and 276). Despite knowing of Patlakh's desire to establish merely a pool hall, in the applications for Certificates of Use[3] that the petitioners submitted to Upper Darby Township, and in their discussion with Zoning Officer Phillips, the petitioners referred to the proposed use as a "physical fitness/sports center" with indoor golf, basketball, billiards, baseball and hockey. (App. at 182-83, 417 and 421). The petitioners further represented that "applicants use is consistent with the previous non-conforming use and classification." (App. at 417). The petitioners also represented to Zoning Officer Phillips that the proposed "sports" uses were not to be small coin operated type arcade games, but rather were to be full scale sport venues including one-on-one basketball courts, baseball batting cages, and a golf driving or putting facility. (App. at 84-85 and 277-80).

The Upper Darby Township Zoning Ordinance requires that applications for Certificates of Use "shall contain all information necessary for Zoning Officer to ascertain whether the proposed . . . use or change in use complies with the provisions of this Ordinance." (App. at 44 [Section 1601]) . The zoning ordinance also provides that "no permit shall be considered complete or permanently effective until the zoning officer certifies that the use is in conformity with the provisions of the Upper Darby Township Ordinances." (App. at 44 [Section 1602]).

Prior to granting petitioners use permits, Zoning Officer

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3. "Under the Township's Ordinance, a use permit serves two primary functions. First, the use permit application allows the zoning officer to determine whether the intended use conforms to the allowed uses of the property under the zoning laws. Ordinance § 1601. Second, the use permit is a necessary predicate to any structural alteration of the property." (Opinion of the Lower Court, Petitioners' Petition at 15a.)

Phillips asked the petitioners to provide him with evidence that there had not been an improper lapse in the prior conforming health club use (App. at 87) pursuant to the Upper Darby Township Zoning Ordinance which provides that "should a non-conforming use cease operation for a period of twelve (12) consecutive months, said use shall be considered abandoned and all rights arising from the nonconforming status shall be considered voided." (App. at 42 [Section 1202(c)]). In response to Phillips' request, the petitioners submitted to him letters from two real estate brokers purporting to establish no lapse of use. (App. at 87). However, the petitioners failed to supply Phillips with a third letter in their possession at that time. That letter was from the Philadelphia Electric Company and indicated that electrical service for the prior health club use was terminated more than twelve months prior to the petitioners' use application. (App. at 250). This letter would have called into question whether the prior non-conforming use had lapsed, precluding the use of the premises as a health club or any other non C-1 use.

Based upon the documents submitted by the petitioners and the petitioners' oral representations, Zoning Officer Phillips, then believing the petitioner's proposed use to be in compliance with Township Ordinances, issued Certificates of Use to the petitioners. Thereafter, the petitioners entered into a lease with Patlakh on or about August 10, 1990. This lease recited the following:

> By zoning permit dated August 1, 1990, the Upper Darby Township Building Inspector granted a permit to allow the operation of the *sports center and snack bar* as described in the attached application for a Certificate of Use. *It is understood and agreed that Landlord does not warrant that Tenant's proposed use of the property is in accordance with any applicable zoning ordinance* and is not responsible for any

> actual or consequential damages should this use be determined to violate zoning. However, *if during the term of this lease, Upper Darby Township determines that Tenant's operation of thirty billiard tables along with the uses described above is determined not permitted under the applicable zoning, Tenant shall have the option to terminate this Lease,* upon 30 days written notice to Landlord: provided, however, Tenant shall remain liable for all rent due hereunder if tenant is permitted to operate its business while Landlord pursues whatever action it deems necessary to pursue a zoning challenge, at Landlord's expense, including the commencement of a suit in a court of law and any appeals related thereto.

(App. at 349) (emphasis added).

The true intended use of these premises did not become apparent to Township officials or Zoning Officer Phillips until January of 1991 when flyers were circulated throughout the community and advertisements appeared in local newspapers advising that a twenty-four hour billiard hall was being opened at the premises. (App. at 464). The advertisement for the opening of the petitioners' premises stated, *inter alia,* "Grand Opening Billiard Sports Club Delaware County's Largest Billiard Club Twenty-Five Pool Tables, Pinball Machines . . . Open Twenty-Four Hours, Seven Days A Week." (App. at 464).

Thereafter, individuals who lived in the residential neighborhood adjacent to the premises notified respondent, Councilperson White of the advertisement. (App. at 327-39). Councilperson White thereafter called Phillips who advised White that he would send out an inspector to observe the premises. (App.

at 226-27). An inspection of the premises was thereafter performed by Code Inspection Officer, Robert Welsman. (App. at 226-27 and 342). On or about January 7, 1991, based upon Mr. Welsman's inspection of the second floor of the premises it was determined that Patlakh was attempting to open for business with twenty-five pool tables, a coin operated video game and a juke box, and that no other "sports" equipment was present at the second floor of the premises. (App. at 282-83 and 342-43).

On or about January 8, 1990, in defiance of Upper Darby Township Code Enforcement Officer Welsman's instructions not to open until all permits were approved, and lacking any legal authority, Certificate Occupancy or other authorization, Patlakh opened for business.

Patlakh was subsequently ordered by police to shut down his operation. At no time was a Certificate of Occupancy issued by Upper Darby Township. Nor did petitioners obtain the requisite prior approvals.[4]

In response to a call by petitioner Price, a meeting was scheduled between Price and Upper Darby Township officials on January 8, 1991. (App. at 107). At that meeting the matter was reviewed and discussed and Price was told that the Use Certificates would be rescinded and that she should go to the Zoning Hearing Board. (App. at 113 and 128). However, petitioners did not seek

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4. Plaintiffs claim in their brief that they had been told by the fire marshall and plumbing inspector that the premises had passed inspection; however, no such official approval had been given nor had the plaintiffs obtain the requisite certification from the Commonwealth of Pennsylvania pursuant to the Pennsylvania Fire and Panic Act. All of said certifications would have been necessary to receive a final Certificate of Occupancy. The Township health inspector did not grant approval and required Patlakh to make additional structural modifications which he did not complete until after the use permit was revoked — the work was never approved and no certification was given.

relief from the Zoning Hearing Board. Rather than seeking a review by the Zoning Hearing Board, and before even receiving formal written notice that the certificates were rescinded, petitioner Price told the respondents during the January 8, 1991 meeting that she was going to sue them. (App. at 119-20). Zoning Officer Phillips thereafter, by letter dated January 11, 1991, advised the petitioners that their use permits were revoked "because these permit[s] were issued erroneously based on false and misleading application [sic]. (Lower Court Opinion, Petitioners' Petition at 18a).[5] Thereafter petitioners filed the instant suit.[6] Following respondents' Motion for Summary Judgment the lower court entered judgment in favor of respondents holding that the petitioners' claims were not ripe for judicial review because of their failure to seek a final decision regarding their proposed use of their property from the appropriate Upper Darby Township administrative body. On appeal to the Court of Appeals for the Third Circuit, the petitioners conceded that they "do not challenge the constitutionality of any zoning or permit regulations of Upper Darby Township . . ." (Reply Brief of Appellants at p. 18 lines 4-6; *see also*: Petitioners' Petition for Writ (Reasons for Granting Writ) at p.13). The Third Circuit Court of Appeals, per Judge Scirica, vacated the District Court's judgment and remanded with instructions to dismiss the petitioner's Complaint as not being ripe. This Petition for Writ of Certiorari follows.

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5. "The extent of Phillip's action amounted to a decision of a zoning officer denying a permit (albeit the denial came as a revocation of an issued, though not enforceable, permit). (Lower Court Opinion, Petitioners' Petition at 8a).

6. Plaintiffs never sought a review of Phillip's decision from the Zoning Hearing Board which by statute is the only local Township body given authority to render "final adjudications". 53 P.S. § 10909.1 (App. at 477).

SUMMARY OF ARGUMENT

The courts below did not depart from established precedent when they determined that the petitioners' claims under Section 1983 were not ripe for adjudication based upon this Honorable Court's holding in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985). The courts below correctly decided that whether premised on substantive due process, procedural due process or equal protection violations, the petitioners' claims were not ripe for judicial review because they had not sought reconsideration or a variance for special exception to the zoning officer's revocation of their use permits from the local zoning hearing board, given exclusive jurisdiction to render a final decision on the application of zoning ordinances to the petitioners' property.

The petitioners' claim that the zoning officer was motivated by racial animus or other improper motive does not except the petitioners from complying with the *Williamson* ripeness requirement. The petitioners admit that they do not challenge the constitutionality of any zoning or permit regulation of Upper Darby Township and thus must seek a final decision from the proper zoning board before bringing suit in federal count under Section 1983.

This Honorable Court's decision in *Williamson* and its progeny are fully consistent with the lower courts' decisions below and for this reason this Honorable Court should deny the petitioners' Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I.

THE COURTS BELOW DID NOT DEPART FROM ESTABLISHED PRECEDENT WHEN THEY DETERMINED THAT THE PETITIONERS' CLAIMS OF CONSTITUTIONAL RIGHTS VIOLATIONS, WHETHER PREMISED ON SUBSTANTIVE DUE PROCESS, PROCEDURAL DUE PROCESS, OR EQUAL PROTECTION VIOLATIONS, WERE NOT RIPE FOR JUDICIAL REVIEW BECAUSE THE PETITIONERS HAD NOT SOUGHT, NOR GIVEN THE LOCAL LAND PLANNING AUTHORITY THE OPPORTUNITY TO RENDER, A FINAL DECISION ON THE NATURE AND EXTENT OF THE IMPACT OF THE ZONING ORDINANCES ON THE PETITIONERS' PROPERTY.

The courts below properly determined that the petitioners' claims were not ripe for judicial review because the decision that petitioners' claim gives rise to their cause of action was not a final decision. The ripeness doctrine is based upon the "case or controversy" requirement of Article III of the federal Constitution, as well as upon prudential policy reasons. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 579-82 (1985) (Constitutional Doctrine); *Buckley v. Valeo*, 424 U.S. 1, 117-18 (1976) (per curiam) (prudential doctrine); 13A Wright, Miller and Cooper, *Federal Practice and Procedure: Jurisdiction* 2d § 3532.1, at 115 (1984). The need to consider prudential limitations in addition to those framed in the Constitution was articulated by Justice Frankfurter as follows:

> The restriction of our jurisdiction to cases and controversies within the meaning of Article III . . . is not the sole limitation on the exercise of

> our appellate powers, especially in cases raising constitutional questions.

Id. at 117-18 (*citing Poe v. Ullman*, 367 U.S. 497, 502-03, 81 S. Ct. 1752, 1755, 6 L. Ed. 2d 989 (1961)).

Thus, the decision not to exercise judicial review based upon the lack of ripeness can be predicated upon either constitutional or prudential policy reasons.

Id. at 118.

> Ripeness doctrine is drawn both from Article III limitations on judicial power and discretionary reasons of policy for refusing to exercise existing power. The central concern of both power and discretion is that the tendered case involves uncertain and contingent future events that may not occur as anticipated, or indeed may not occur at all.

Id. n. 9 (*quoting Metzenbaum v. FERC, C.A.*, 675 F.2d 1282, 1289-90 (D.C. Cir. 1982)).

Beyond the general concerns of contingency and uncertainty, discretionary policy reasons for invoking the ripeness doctrine include considerations of deference and comity to state institutions; avoidance of unnecessary constitutional decisions; and the existence of opportunities to secure relief from an executive or administrative entity. *Id.* at 115 and 120-21. The opportunity to secure relief from a state agency is distinguishable from the requirement to exhaust administrative remedies. *See* 13A Wright, Miller and Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 3532.6 (1984). The prudential considerations weighing against finding that a claim is ripe are more pronounced

where a federal court is asked to interfere with a state agency as opposed to a federal agency. *Id.* at 203.

In weighing the various discretionary policy reasons for refusing to exercise existing power, this Honorable Court should consider the effect that a finding for the petitioners herein would have on the ability of any disappointed real estate developer to enter federal court at any point in the development process and wield the substantial power of 42 U.S.C. §§ 1983 and 1988. Providing easy access to the federal courts for every disappointed developer who chooses not to utilize even the most expeditious available state procedures would result in an unnecessary flood of § 1983 litigation. This Honorable Court and the Circuit Courts have uniformly recognized these prudential limitations which strongly caution against extending 1983 jurisdiction to any land use dispute and the need for constitutional line drawing in this area.

The First Circuit has stated the following concerning the dangers of elevating local land use disputes to the level of federal constitutional violations:

> [w]here ... the state offers a panoply of administrative and judicial remedies, litigants may not ordinarily obtain federal court review of local zoning and planning disputes by means of § 1983.

Raskiewcz v. Town of New Boston, 754 F.2d 38, 44 (lst Cir. 1985), *cert. denied*, 474 U.S. 845 (1985).

Similarly, the First Circuit has also declared that:

> *Every* appeal by a disappointed developer from an adverse ruling by a local planning board necessarily involves some claim that the board

> exceeded, abused, or "distorted" its legal authority in some manner, often for some allegedly perverse (from the developers point of view) reason. It is not enough simply to give the state law claims constitutional label such as "due process" or "equal protection" in order to raise a substantial federal question under Section 1983.

Creative Environments, Inc. v. Estabrook, 680 F.2d 822, 833 (lst Cir. 1982) (emphasis in original).

The Seventh and Ninth Circuits have stated:

> In land use challenges, the doctrine of ripeness is intended to avoid premature adjudication or review of administrative action. It rests upon the idea that courts should not decide the impact of regulation until the full extent of the regulation has been finally fixed and the harm caused by it is measurable.

Unity Ventures v. County of Lake, 841 F.2d 770, 774 (1980); *quoting: Herrington v. County of Sonoma*, 834 F.2d 1488, 1494 (9th Cir. 1987)

The Third, Ninth and Eleventh Circuits have stated:

> Zoning is a delicate area where a county's power should not be usurped without giving the county an opportunity to consider concrete facts on the merits prior to a court suit . . . [*Williamson* and *McDonald*] erected imposing barriers . . . to guard against the federal courts becoming the Grand Mufti of local zoning

> boards . . . land use regulati[illegible]nerally affects a broad spectrum of persons and societal interests, and . . . local political bodies are better able than federal courts to assess the benefits and burdens of such legislation.

(Lower Court Opinion, Petitioners' Petition at 25a-26a, *citing*: *Eide v. Sarasota County,* 908 F.2d 716, 726 n.17 (11th Cir. 1990), *cert. denied,* 111 S. Ct. 1073 (1991); *Hoehne v. County of San Benito,* 870 F.2d 529, 532 (9th Cir. 1989); *Rogin v. Bensalem Tp.,* 616 F.2d 680, 698 (3rd Cir. 1980), *cert. denied,* 450 U.S. 1029 (1981).

A.

THE DECISIONS OF COURTS BELOW DID NOT DEPART FROM THE PRECEDENT ESTABLISHED BY THIS HONORABLE COURT IN *WILLIAMSON.* THIS HONORABLE COURT'S DECISION IN *PATSY FLORIDA BOARD OF REGENTS,* AS EXPLAINED BY THE COURT IN *WILLIAMSON* IS SIMPLY DISTINGUISHABLE AND INAPPLICABLE TO THIS CASE.

Petitioners' claims are not ripe for judicial review because of the petitioners' failure to seek a final decision regarding the rescission of their use certificates, or to seek a variance or special exception. Petitioners' failure to take any of these actions prevents the characterization of the decision to rescind the certificates as a final decision — this conclusion is compelled by the Supreme Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank,* 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985), and is supported by the decisions of the Circuit Courts and particularly the Third Circuit's decision in *Midnight Sessions. Ltd. v. City of Philadelphia,* 945 F.2d 667 (3d Cir. 1991), *cert. denied,* 112 S. Ct. 1668 (1992).

In *Williamson County,* the Supreme Court applied a substantive due process analysis in holding that a property owner's 1983 claim was premature because the property owner failed to seek variances from zoning and subdivision ordinances. *Williamson County,* 473 U.S. at 200, 105 S. Ct. at 3123. In *Williamson County,* the Court reasoned that the failure to seek variances meant that there had not been a final decision made regarding the application of the ordinances to the property in question. *Id.* While it is true that *exhaustion* of administrative remedies is not required in a 1983 action, *Patsy v. Florida Board of Regents,* 457 U.S. 496, 102 S. Ct. 2537, 73 L. Ed. 2d 172 (1982), the Supreme Court in *Williamson County* distinguished the case before it, stating that "the question of whether administrative remedies must be *exhausted* is conceptually distinct . . . from the question whether an administrative action must be *final* before it is judicially reviewable." *Williamson County, supra,* 473 U.S. at 192, 105 S.Ct. at 3119 (emphasis added).

The basis of the § 1983 claim in *Williamson County* was the eventual disapproval of a development plat by the Williamson County Regional Planning Commission (hereinafter "the Commission") after the petitioner bank's predecessor in interest, a land developer, had obtained approval of a preliminary plat for the development of a tract of land from the respondent Commission. The original approval was based upon the County ordinance and regulations in effect when the approval was given in 1973. The County ordinance was subsequently changed in 1977, thereby reducing the allowable density of dwelling units. Exercising its own discretion; however, the Commission continued to apply the 1973 regulations until 1979 when "the Commission reversed its position and decided that plats submitted for renewal should be evaluated under the zoning ordinance and subdivision regulations in effect when the renewal was sought." *Id.* at 178-79, 105 S. Ct. at 3112. The Commission then disapproved several plats for further development of the property for reasons including failure to

comply with density requirements under the ordinance and regulations then in effect.

At trial, the jury awarded damages to the petitioner, but the District Court granted judgment notwithstanding the verdict. The Sixth Circuit reversed, reasoning in part that the verdict indicated that the jury must have found that the petitioner acquired a vested right under state law to develop the property according to the plat approved under the 1973 ordinance. *Id.* at 184, 105 S. Ct. at 3115. The Commission argued before the Supreme Court that the application of regulations by a governmental entity should not be viewed as effecting a taking within the meaning of the Fifth Amendment. *Id.* at 185, 105 S. Ct. at 3116. Rather, the Commission argued that such conduct should be viewed as a violation, if at all, of the Fourteenth Amendment's due process clause if there is an invalid exercise of the government's police power. *Id.* In reaching its holding that the petitioner's claims were not ripe, the Supreme Court found that the question before it was not properly presented no matter how the governmental action was characterized, reasoning that "whether we examine the Planning Commission's application of its regulations under Fifth Amendment 'taking' jurisprudence, or under the precept of due process, we conclude that [plaintiff's] claim is premature." *Id.* The Supreme Court based its holding upon the fact that the petitioner could have sought variances from the Commission's *application* of the zoning and subdivision ordinances, but failed to do so. *Id.* at 200, 105 S. Ct. at 3123. The Court specifically indicated that the petitioner should have sought variances from the County Board of Zoning Appeals. *Id.* at 180 n.3, 188, 105 S. Ct. at 3113 n.3, 3117. The Court reasoned that the failure to seek variances meant that there had not been a final decision made regarding the application of the ordinances to the property in question. *Id.* at 200, 105 S. Ct. 3123.[7]

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7. The Court summed up its holding by stating that the plaintiff's "claim is premature, whether it is analyzed as a deprivation of property without due

(Cont'd)

The petitioners' attempt to distinguish the Supreme Court's decision in *Williamson County,* arguing that this Court's decision in *Patsy v. Florida Board of Regents,* 457 U.S. 496 (1982) is controlling where petitioners' substantive and procedural due process claims are grounded on a challenge to the constitutionality of the respondents' conduct, and not the constitutional rationality of the zoning regulations as applied to the petitioners' property. This issue, however, was directly before the Court in *Williamson County,* as the conduct complained of in *Williamson County* was the Commission's conduct/decision reversing its policy concerning which zoning ordinances and subdivision regulations it would apply to plats submitted for renewal. *Williamson County, supra* at 178-79, 105 S.Ct. at 3112. The *Williamson County* court specifically stated that even under its decision in *Patsy,* the *Williamson County* developers were required to:

> resort to the procedure for obtaining variances [which] would result in a conclusive determination by the Commission whether it would allow [the developer] to develop the subdivision [the developer] proposed. The Commission's refusal to approve the preliminary plat does not determine that issue; it prevents [the developer] from developing its subdivision without obtaining the necessary variances, but leaves open the possibility that [the developer] may develop the subdivision

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(Cont'd)

process under the Fourteenth Amendment, or a taking under the just compensation clause of the Fifth Amendment." *Id.* at 200, 105 S. Ct. at 3123-24. The court also stated that . . . [t]he Commission's refusal to approve the preliminary plat does not determine that issue; it prevents respondent from developing its subdivision without obtaining the necessary variances, but leaves open the possibility the respondent may develop the subdivision according to its plat after obtaining the variances. *Id.* at 193-94, 105 S. Ct. at 3120.

> according to its plat after obtaining the variances. In short, the Commission's denial of approval does not conclusively determine whether [the developer] will be denied all reasonable beneficial use of its property and therefore is not a final, reviewable decision.

Id. at 193-94, 105 S.Ct. 3120

The petitioners herein allege, as did those in *Midnight Sessions, Ltd v. City of Philadelphia,* 945 F.2d 667, 686 (3rd Cir. 1991), *cert. denied,* 112 S. Ct. 1668, that the respondents engaged in an invalid exercise of their police power amounting to a substantive due process violation. This claim was considered and rejected by the Supreme Court in *Williamson County* where it found that the petitioner's claim was not ripe, even when viewed as a substantive due process claim, despite the fact that the jury found that the petitioner acquired a vested right to develop its property according to a plat approved before the respondents reversed their position and began applying the later ordinance. *Williamson County,* 473 U.S. at 184, 191, 105 S.Ct. at 3115, 3119.

As discussed *supra*, the Supreme Court premised its holding that the petitioner's claims were not ripe on the fact that the *Williamson County* developer could have sought variances from the Commission or the County Board of Zoning Appeals, but did not. This is directly analogous to the situation in the instant case where the petitioners could have sought variances frorn the local Zoning Hearing Board, but failed to do so. The County Board of Zoning Appeals in *Williamson County* is the administrative equivalent of the local Zoning Hearing Board in this case. Both Boards are designated by law as the authority empowered to render for the local government a final decision.[8]

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8. *Compare*: the powers of the Williamson County Board of Zoning (Cont'd)

The petitioners also seek to distinguish and make inapplicable *Williamson County* by arguing that it involved a taking claim while in this case the petitioners are challenging the constitutionality of the respondents' conduct. This argument has no merit. This Court stated that the petitioner's claim was not ripe whether the claim was viewed as a taking claim or a due process claim. *Id.*, 473 U.S. at 199, 105 S. Ct. at 3123. Because the Court applied the ripeness analysis to these two views of the claim in the alternative, it is apparent that the Court does not require the presence of a taking claim in order to hold a due process claim not ripe.

The petitioners herein claim that the respondents' conduct alone may be sued upon under 1983, if it can be shown to have inflicted immediate injury. (Petitioners' Petition at 14-16). In *Williamson,* however, the developer had, prior to filing suit, appealed the Commission's initial rejection of its plat to the Board of Zoning Appeals which determined that the Commission had applied the wrong zoning regulations. Despite this decision, the Commission continued to reject the developer's plat, declining to follow the decision of the Board. It was as a result of this conduct that the developer filed suit. *Williamson,* at 180-82, 3113-14. The *Williamson* court found that the Developer was still required to seek a variance from Commission's decision prior to any claim becoming ripe for adjudication under 1983. *Id.* 193-94, 3120.

As the Third Circuit Court observed in its opinion below:

(Cont'd)

Appeals, "[t]o hear and decide appeals on any permit, decision, determination, or refusal made by the [County] Building Commissioner or other administrative official . . . [t]o hear and decide applications for variances from the terms of this resolution . . ." *Williamson, supra.* at 180 n.3, 3113 n.3 and the Pennsylvania Municipal Planning Code, "[t]he zoning hearing board shall have exclusive jurisdiction to hear and render final adjudications in . . . [a]ppeals from the determination of the zoning officer, including, but not limited to, the granting or denial of any permit . . ." 53 P.S. § 10909.1(a) (App. at 477).

> Under Pennsylvania's Municipal Planning Code, Phillips must Administer the Township's zoning ordinance in the first instance. *See* Pa. Stat. Ann. tit. 53, 10614; *see also Rogin v. Bensalem Tp.*, 616 F.2d at 694 (zoning officer has "inflexible duty to apply zoning regulations as he or she understands them"). Any action by Phillips, however, did not represent the Township's final interpretation or application of the zoning ordinance. *See Rogin*, 616 F.2d at 694-95. Only the zoning hearing board's determination is a "final adjudication" under the terms of the Code. Pa. Stat. Ann. tit. 53, § 10909.1(a). The zoning hearing board has exclusive authority to determine whether Phillips failed to follow prescribed procedures or misinterpreted or misapplied any provision of the Township's ordinance. *See* Pa. Stat. Ann. tit. 53, § 10909.1. the Ordinance requires no deference by the zoning hearing board to Phillip's decision, and the zoning hearing board would have been free to consider the facts and circumstances of Patlakh's application anew. *See id.*

(Lower Court Opinion, Petitioners' Petition at 28a-29a) (footnotes omitted).

In *Midnight Sessions*, the Third Circuit also held that the petitioners' substantive due process claims were not ripe for judicial review even in absence of a takings claim. *Midnight Sessions*, 945 F.2d at 678-79. *Midnight Sessions* is consistent with the decisions in other Circuits that have applied ripeness analysis to constitutional claims in the absence of a taking claim. *Eide v. Sarasota County*, 908 F.2d 716, 723 (11th Cir. 1990); *Unity*

Ventures v. County of Lake, 841 F.2d 770, 775 (7th Cir. 1988).

In attempting to distinguish the instant case from takings cases that involve the effects that government action have upon a petitioner's use of its property; the petitioners ignore the damages that they have requested. (Petitioners' Petition at 12-13). As their primary damage request, the petitioners alternatively seek either $1,200,000.00 in lost rental revenues from the property over a ten year period, or approximately $1,000,000.00 representing lost proceeds from a sale of the property which was conditioned upon the property having the income level fixed in the Patlakh five year lease. It can be argued that the petitioners are, in effect, alleging a taking of property in all respects except in name.[9] Even if the petitioners' characterization of their claim as falling under the Fourteenth Amendment were accepted, any attempt by the petitioners to assert that this case is not about the effect of the respondents' actions upon the value of their property is disingenuous.

Contrary to the petitioners' claim, the lower courts herein have not decided this case in conflict with the several Circuit Court decisions relevant to the ripeness issue raised herein. The Ninth Circuit has followed the Supreme Court's decision in *Williamson County* holding that the final decision requirement is applicable to substantive due process, procedural due process and equal protection claims brought to challenge the application of land use regulations by government officials. *Traweek v. City and County of San Francisco*, 920 F.2d 589, 593-94 (9th Cir. 1990); *see also, Southern Pacific Transportation Co. v. City of Los Angeles*, 922 F.2d 498, 507 (9th Cir. 1990) (*citing Pennell v. San Jose*, 45 U.S. 1, 11 n. 5, 108 S. Ct. 849, 857 n. 5, 99 L. Ed. 2d 1 (1987); *Hoehne v. County of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989). According to the Ninth Circuit, a " 'final decision' requires at least: 1) a

9. *See, e.g. Eide*, at 723 n. 11, 726.

rejected development plan and 2) a denial of a variance." *Traweek*, 920 F.2d at 594. In *Traweek*, the Ninth Circuit held that the petitioners' claims for denials of substantive due process, equal protection and procedural due process (based upon the passage of an ordinance prohibiting Traweek's previously approved condominium conversion project) were not ripe for judicial review because the petitioner's failure to apply for a variance meant that there had not been a final decision. *Id.*

The petitioners' citation of the Ninth and Sixth Circuits' decisions in *Harris v. County of Riverside*, 904 F.2d 497 (9th Cir. 1990) and *Nasierowski Brothers Investment Company v. City of Sterling Heights*, 949 F. 2d 890 (6th Cir. 1991) for the proposition that 1983 challenges to the actual conduct of local government land use regulators are ripe without seeking a further decision at the local level is inapplicable. In both *Harris* and *Nasierowski*, the courts found a denial of the petitioners' procedural due process rights based upon facial challenges to the manner in which the local governments enacted the zoning ordinances effecting the petitioners' properties. As enacted, the ordinances were different than the previously published proposals, were enacted with a specific provision effecting the petitioners' property, and the petitioners were not given notice and an opportunity to be heard in accordance with the governments' own rules and regulations.[10]

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10. Petitioners also rely upon the Rhode Island District Court decision of *P.L.S. Partners, Women's Medical Center v. Cranston*, 696 F. Supp. 788 (D.R.I. 1988), for the proposition that the ripeness requirement cannot be applied to a substantive due process claim. (Brief of Appellants at 33-37). *P.L.S.* is a District Court decision out of line with all Circuit Court decisions discussed *supra*, as can be seen from the Court's belief that "it is quite clear that the *Williamson* Court was addressing only the respondent's takings claim and was not considering the application of the ripeness doctrine to the respondent's substantive and procedural due process claims . . ." *Id.* at 795. This is clearly not the generally accepted reading of *Williamson County*, nor the law of any Circuit.

Here the petitioners do not claim that the Township failed to follow its own rules and regulations, but rather allege that although the zoning officer had the power to revoke the petitioners' permits for the reasons given that his true motivation was improper.

The Seventh Circuit explicitly adopted the reasoning of the Ninth Circuit in a decision wherein it applied the final decision requirement to hold that the petitioner-developer's substantive due process, procedural due process and equal protection claims were not ripe for judicial review. *Unity Ventures v. County of Lake*, 841 F.2d 770, 774-75 (7th Cir. 1988). In *Unity Ventures*, Circuit specifically stated that it would apply a ripeness analysis to the petitioner's equal protection and due process claims even though the petitioner's suit was not premised on a takings claim. *Id.* at 775. In *Unity Ventures*, the petitioners claimed that the respondents improperly denied their requests for linkage to an existing county-wide sewer system and their application for a permit to build their own sewer facility in an improper attempt to control the use of their property. *Id.* at 771. The petitioners claimed that the acts undertaken by the respondents included, *inter alia*, filing objections to construction of their own sewage treatment plant and rescinding an earlier resolution to consider allowing them to connect to the county-wide sewer system. *Id.* at 774. The court observed that although the petitioners claimed that this conduct on the part of the local land use planners demonstrated an intent to make any effort on petitioners' part to obtain a sewer connection futile, the petitioners had never formally requested a final decision from the local governing body with final decision making authority. *Id.* at 776. For this reason the court ruled that the case was not ripe for adjudication. *Id.*

The Court of Appeals for the First Circuit has also applied the ripeness doctrine in a recent decision. *Gilbert v. City of Cambridge*, 932 F.2d 51, 59, (lst Cir. 1991). As in *Unity Ventures*, the *Gilbert* court found that there had not been a rejected

development plan and therefore no final decision. Accordingly, the courts in those cases had no reason to reach the second requirement for a "final decision": a denial of a variance. *See Traweek*, 920 F.2d at 594.

Moreover, the Eleventh Circuit recently held in a case where a petitioner asserted a substantive due process challenge to a local authority's zoning decision, unaccompanied by any taking claim, that:

> [i]f the authority has not reached a final decision with regard to the application of tne regulation to the landowner's property, the landowner cannot assert an as applied challenge to the decision because, in effect, a decision has not yet been made. . . . Therefore, . . . for as applied arbitrary and capricious due process claims to be ripe, the particular zoning decision challenged must be finally applied to the property at issue.

Eide v. Sarasota County, 908 F.2d 716, 725 (1990) (footnote omitted).

As stated *supra*, the Third Circuit Court very recently applied the "final decision" requirement in a case factually very similar to the instant case. *Midnight Sessions, Ltd v. City of Philadelphia*, 945 F.2d 667 (3d Cir. 1991). In *Midnight Sessions*, property owners who desired to open a dance hall claimed, among other things, that they were denied substantive due process when the City denied a certificate of occupancy and allegedly harassed the owners by citing them for violations. The Court of Appeals emphasized the fact that the property owners did not appeal the denial of the certificate of occupancy nor the citations for violations to the appropriate Review Board. The court held that the property

owners' substantive due process claim was not ripe, reasoning that:

> This failure to appeal precludes "final administrative action" by the City and, therefore, these claims were premature and should have been dismissed on summary judgment. Federal litigation of this kind is not intended to be a substitute for carefully constructed state procedures.

Id. at 686.

Under Pennsylvania's Municipalities Planning Code (MPC), the petitioners could have applied to the Zoning Hearing Board for variances and/or special exceptions. 53 Pa.C.S.A. § 10909.1(a)(5) and (6). The Pennsylvania MPC provides that a Zoning Hearing Board "shall hear requests for variances where it is alleged that the provisions of the zoning ordinance inflict unnecessary hardship upon the applicant." 53 Pa.C.S.A. § 10910.2. Therefore, if the petitioners had applied for a variance, the Zoning Hearing Board had a non-discretionary duty to hear the request. Similarly, the petitioners could have applied to the Zoning Hearing Board for a special exception. 53 Pa.C.S.A. § 10910.2. Finally, the petitioners had a right to appeal the decision of the zoning officer to the Zoning Hearing Board. 53 Pa.C.S.A. § 10909.1(a)(3).

The record shows that the petitioners herein are experienced in real estate investment and development. (App. at 47-48, 53-54 and 134-35). The record also shows that the petitioners knew that they had recourse to the local Zoning Hearing Board. (App. at 44 [1600], 61, 113 and 128). However, petitioners did not take advantage of any of these established state procedures. Rather, it appears that the petitioners determined that they would bypass state procedures before they even received formal written notice

that the certificates were rescinded, because Price told the respondents during the January 8, 1991 meeting that she was going to sue them. (App. at 119-20). Obviously, the petitioners' threat of litigation and the costs attendant thereto was intended by the petitioners to force the respondents to permit the petitioners' improper use of the premises without the petitioners being required to first seek approval from the Zoning Hearing Board as required by law.

This Court should apply the final decision ripeness requirement to the case at bar pursuant to its decisions in *Williamson County,* the Third Circuit's decision in *Midnight Sessions,* and the cited cases from the other Circuit Courts of Appeal. The effect that the application of the zoning ordinances will have upon the petitioners in this case cannot be determined until a final decision is made as to how the zoning ordinance will be applied to the petitioners' property. A final decision was not made at the time the petitioners filed their 1983 claim here because the petitioners not only failed to apply for variances and/or special exceptions from the zoning ordinance as applied to their property, but also never sought all of the final inspections necessary to request and obtain an occupancy permit. It was precisely the petitioner's failure to seek variances that led the Supreme Court in *Williamson County* to conclude that there had been no final decision regarding petitioner's property. Therefore, petitioners' claim is not ripe and not judicially reviewable. This conclusion does not run afoul of the holding regarding exhaustion of administrative remedies in 1983 actions reached in *Patsy, supra,* 457 U.S. 496, 102 S. Ct. 2537, because, once again, "the question whether administrative remedies must be exhausted is conceptually distinct from the question whether an administrative action must be final before it is judicially reviewable." *Williamson County,* 473 U.S. at 192, 105 S. Ct. at 3119.

B.

THE LOWER COURTS DID NOT DEPART FROM ESTABLISHED PRECEDENT IN HOLDING THAT THE PETITIONERS' EQUAL PROTECTION CLAIMS (RACIAL ANIMUS) WERE NOT RIPE FOR JUDICIAL REVIEW.

As discussed *supra*, the petitioners make various arguments in support of their contention that they were not required to appeal the zoning officer's rescission of their use permits or seek a variance or a special exception. The most disingenuous of these arguments is that the petitioners' mere allegation of racial animus in the motives of the Township's zoning officer (or the other respondents) makes inapplicable the *Williamson* finality requirement.

Despite admitting that the zoning officer acted within the scope and authority of existing zoning regulations, the petitioners, who are not members of a suspect or quasi-suspect class, ask that this Honorable Court leap past the question of justiciability and presume improper conduct and a burden on others fundamental rights based merely upon the unfounded allegation made by the petitioners that respondents exerted pressure on the zoning officer based upon community fear that a twenty-four hour pool hall would attract black patrons.[11]

The primary contention of the petitioners, repeated throughout their petition, is that the lower courts misinterpreted their constitutional challenge and failed to focus on the motivalions of the respondents which they claim were ripe for immediate redress under 1983.

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11. Petitioners have apparently chosen not to support with legal authority their claim that the permits were rescinded for political reasons — "because the individual plaintiffs had alienated Township republican leaders in the past." (Petitioners' Complaint at ¶ 39; App. 390).

The petitioners use their claims of racial animus in an attempt to distinguish the precedent established in *Williamson County* and the Third Circuit's decision in *Midnight Sessions, LTD. v. City of Philadelphia*, 945 F.2d 667 (1991), *cert denied*, 112 S. Ct. 1668. However, as discussed *infra*, the lower courts did not mischaracterize the petitioners' constitutional challenge. Rather, the petitioners have mischaracterized and distorted the reasoning of *Williamson County* and it progeny.

The identical issue raised by the petitioners herein has been previously decided by the lower court in its decision in *Midnight Sessions LTD. v. City of Philadelphia*, 945 F.2d 667 (3rd Cir. 1991), *cert denied*, 112 S. Ct. 1668, wherein the petitioners raised the claim that the City's conduct toward them was based in part upon racial animus.[12] The Court's analysis of the ripeness of the petitioners' equal protection claim in *Midnight Sessions* provides in pertinent part as follows:

> Down South's claim that the City arbitrarily and irrationally enforced fire and building regulations to drive it out of business confronts a different obstacle; its substantive due process challenge never ripened for this portion of its claim. In *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. at 200, 105 S. Ct. at 3123, the Supreme Court, employing a substantive due process analysis, held that the respondent's claim that a regulation was an invalid exercise of the police

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12. "The Plaintiffs also alleged that the City denied them equal protection of the laws, asserting in this regard, among other things, that it engaged in intentional race discrimination because it would not license the dance halls as they were in white neighborhoods, but catered to a young black clientele." *Midnight Sessions*, at 670.

> power was premature because it failed to seek variances from certain zoning ordinances and subdivision regulations and, thus, there had not been a final decision on the application of those ordinances and regulation to respondent's property.

Midnight Sessions, 945 F.2d at 686.

The Court continued:

> Down South did not appeal to the Review Board the citations for violations it received from L & I nor the denial of the Certificate of Occupancy. This failure to appeal precludes "final administrative action" by the City and, therefore, these claims were premature and should have been dismissed on Summary Judgment. Federal litigation of this kind is not intended to be a substitute for carefully constructed state procedures.

Id.

It is not clear how the petitioners can contend that the lower courts erred in relying upon this Court's decision in *Williamson* and *Midnight Sessions*. In these cases claims on all fours with those asserted by the petitioners, claims of arbitrary and capricious acts by governmental officials amounting to an abuse of power, are clearly held not be ripe until the local entity given authority to render a determinative decision has done so. In *Midnight Sessions*, the Down South petitioner's claim was "that the City arbitrarily and irrationally enforced fire and building regulations to drive it out of business. . . ." *Midnight Sessions*, 945 F.2d at 686. In fact, Down South asserted that it was put out of business. *Id.* at 673.

Therefore, the Down South petitioner was complaining of arbitrary and capricious acts by governmental officials amounting to an abuse of power just as the petitioners claim in this case. Nonetheless, the Third Circuit, relying on *Williamson County*, held that Down South's substantive due process claim based upon alleged arbitrary and irrational *acts* was premature because Down South's failure to appeal meant that there had not been final administrative action by the City. *Id.* Thus, petitioners' argument that a claim of racial animus makes the final decision requirement of *Williamson* inapplicable is clearly without merit.[13]

The petitioners also contend that the Eleventh Circuit's decision in *Eide* recognizes that an arbitrary and capricious due process claim could be ripe upon the performance of a single act.

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13. The Eleventh Circuit stated that:

> [i]f the authority has not reached a final decision with regard to the application of the regulation to the landowner's property, the landowner cannot assert an as applied challenge to the decision because, in effect, a decision has not yet been made . . . Therefore, . . . for as applied arbitrary and capricious due process claims to be ripe, a particular zoning decision being challenged must be finally applied to the property at issue. *Id.* at 725.

The Seventh Circuit also applies the final decision requirement to due process and

> equal protection claims in the absence of a taking claim. *Unity Ventures v. County of Lake*, 841 F.2d 770, 774-75 (1988). Moreover, this Court applied the final decision requirement in *Midnight Sessions* after finding that the asserted taking claim was invalid. *Midnight Sessions*, 945 F.2d at 678-79. Thus, the ripeness requirement may be applied in cases involving no valid taking claim.

(Brief of Appellants at 36). However, the actual passage cited merely stands for the proposition that an act or decision taken without any rational basis whatsoever may serve as a basis for merely having the decision overturned and possible injunction issued prohibiting future such irrational acts or decisions. *Eide*, at 726. Importantly, neither relief is requested here by the petitioners.

In *Midnight Sessions*, the Down South petitioner claimed that the respondents arbitrarily and irrationally enforced fire and building regulations to drive it out of business. *Midnight Sessions*, 945 F.2d at 686. The alleged arbitrary and capricious acts by the respondents were completed, and Down South claims that it had in fact been run out of business by the respondents' acts of harassment. *Id.* at 673. Nonetheless, this Court held that Down South's due process claim was not ripe for lack of a final decision because the petitioners had not tested the rationality of these citations by appealing them. Id. at 686. Accordingly, the petitioners' argument in this case lacks merit.

CONCLUSION

Based upon the foregoing, it is respectfully requested that this Honorable Court deny Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,

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